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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 38

ALFRED D. ROSENBLATT,

Petitioner,

—VS.—

FRANK P. BAER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y.

EDWARD J. ENNIS
165 Broadway
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for the American Civil Liberties Union, Amicus Curiae

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE**

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in the above-entitled case.

The Union is a forty-five year old private, non-partisan organization engaged in defending the Bill of Rights, with special emphasis upon the First Amendment. The ACLU appeared as *amicus curiae* in the landmark case of *New*

* This motion is filed because the Respondent has denied consent. The letter of denial, and Petitioner's letter of consent, have been filed with the Clerk of the Court.

York Times v. *Sullivan*, 376 U. S. 254 (1964), which set down the constitutional boundaries within which state libel law must be confined in suits for damages initiated by government officers. The position advocated by the Union was adopted by a majority of the Court.

The case at bar presents one question left open by the *New York Times* case, namely, the category of public officials to which its rule applies. The plaintiff in *New York Times* was an elected official of the City of Montgomery, Alabama; the plaintiff here held a non-elective post as the manager of a publicly owned ski area. It is the ACLU's view that the distinction is constitutionally inconsequential because the comment claimed to be libelous in both cases concerned matters of public affairs relevant to the performance of official duties.

We believe that the exposition of the views set forth in the attached brief will be of substantial assistance to the Court.

Respecfully submitted,

Osmond K. Fraenkel
120 Broadway
New York, N. Y.

Edward J. Ennis
165 Broadway
New York, N. Y.

Melvin L. Wulf
156 Fifth Avenue
New York, N. Y.

Attorneys for the American Civil Liberties Union, Amicus Curiae

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of The American Civil Liberties Union

The interest of *amicus* is set forth in the preceding motion.

Statement of the Case

This libel action was brought by Frank P. Baer, the former supervisor of the Belknap Recreation Area at Gilford, New Hampshire, based on a column which appeared in the *Laconia Evening Citizen* on January 29, 1960.

Since 1950, Baer had been employed by the Belknap County Commissioners as supervisor of the county-owned Belknap Recreation Area at an annual salary of $8,000 under a written agreement which required that he

> "supervise the collection and disbursement of all funds coming from or disbursed on account of said recreational area (par. 5); transmit all funds accruing from said recreational area to said county commissioners (par. 6); carefully examine all bills and invoices submitted relative to said recreational area and either approve or disapprove the same (par. 7)." *Baer* v. *Rosenblatt*, 106 N. H. 26, 203 A. 2d 773, 776 (1964).

For some time the operation of the Belknap Recreation Area had been a matter of public controversy in the area. Beginning in December, 1958, the petitioner, a local businessman and contributor of an unpaid column in the *Laconia Evening Citizen* entitled "Out of My Head", wrote a number of columns emphasizing the squalid and rundown condition of the area (Def. Ex. 25, December 16, 1958) and urging that the County Commissioners make needed capital improvements in order to make the area more attractive for large numbers of winter tourists and skiers and thus benefit the entire area economically (Def. Ex. 24, December 11, 1958). In one of his columns, the petitioner emphasized that "This please is NOT criticism of Fritzie as manager. Think that man one of greatest 'promoters' ever knew, but poor guy's hands hogtied by complete lack of capital for making real improvements" (Def. Ex. 25, December 16, 1958). This controversy finally resulted in legislation transferring control of the area from the County Commissioners to a newly established five-man commission. N. H. Laws (1959), ch. 399, approved June 15, 1959.

Shortly after the adoption of the legislation, Baer's contract as supervisor of the area was terminated effective July 10, 1959. In September of 1959, the new commission assumed control of the area. Dana S. Beane, Jr., was elected as first Chairman and a new manager, Warren Warner, was employed to succeed the respondent as supervisor of the area.

On January 29, 1960, the petitioner wrote the following column relative to the operations of the area since being placed under the control of the new commission:

> "Been doing a little listening and checking at Belknap Recreational Area and am thunderstruck by what am learning.
>
> "This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.
>
> "On any sort of comparative basis, the Area this year is doing literally hundreds of per cent better than last year.
>
> "When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following questions:
>
> What happened to all the money last year? and every other year? What magic has Dana Beane and rest of commission, and Mr. Warner wrought to make such tremendous difference in net cash results." 203 A. 2d at 776.

On March 9, 1960, respondent brought suit for libel alleging that, since he had been supervisor of the Area

during the previous years referred to in petitioner's column, the column could be and was understood to mean

> " 'that the difference in the net cash results of the income of said Area was due because the plaintiff has committed larceny and that said money was stolen or embezzled or converted by the plaintiff to his own use', and that 'said false, scandalous, malicious and defamatory libels were calculated to bring plaintiff into hatred, contempt, ridicule.' " 203 A. 2d 773, 776.

At the trial in April of 1963, almost a year prior to the decision of this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), the petitioner pleaded the truth and that his criticisms relative to the operation of the Belknap Mountain Recreation Area by the respondent and the Belknap County Commission were privileged in the public interest. On April 17, 1963, the jury returned a verdict of $31,500 in favor of the respondent, from which an appeal was taken to the Supreme Court of New Hampshire which affirmed the judgment of the trial court. *Baer* v. *Rosenblatt,* 106 N. H. 26, 203 A. 2d 773 (1964).

ARGUMENT

I.

The instructions of the trial court, authorizing the recovery of damages based on findings that defendant's charges were not "based on reasonable grounds" or that they were published with "ill will, evil motive, intention to injure, or a wanton or reckless disregard of the rights of others", are inconsistent with the decisions of this Court in *New York Times Co.* v. *Sullivan* and *Garrison* v. *Louisiana*.

The trial court instructed the jury that it was entitled "to find that the public had a right to be informed about any difficulties or discrepancies in income or thieving at this public area." It termed such matters "in the public domain", and "public property", and stated that the petitioner's charges, even if untrue, would consequently be conditionally privileged. However, the jury was also instructed that the defense of privilege would be inapplicable unless the petitioner also proved that his charges were "based on reasonable grounds." The court further charged the jury that "It is not enough to show that the defendant actually believed the source of his information to be true"; that "such belief must be founded on reasonable grounds that would satisfy the ordinary man of average prudence."

However, this restricted privilege could not protect the petitioner if the jury found "actual malice", which the trial court defined as "ill will, evil motive, intention to injure or a wanton or reckless disregard of the rights of others."

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), this Court held the First Amendment to prohibit a public official "from recovering damages for a defamatory falsehood" unless he shows, "with the convincing clarity which the constitutional standard demands", that the statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S. at 279-80, 285-86.

The Supreme Court of New Hampshire found no conflict between the instructions of the trial court on malice and privilege and the constitutional principles which were enunciated for the first time by this Court in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).[1] However, as this Court makes emphatically clear in *Garrison* v. *Louisiana,* 379 U. S. 64, 79 (1964), the New Hampshire Supreme Court's approval of the jury charge here does not follow

[1] It is clear that the petitioner is not precluded from raising the new constitutional principles of the *New York Times* case by his failure to raise them in the trial court in April, 1963, almost a year prior to their enunciation by this Court. As this Court has repeatedly emphasized, a waiver of constitutional rights may be found only where there has been "an intentional relinquishment or abandonment of a known right or privelege," *Fay* v. *Noia,* 372 U. S. 391, 439 (1963) and "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson* v. *Zerbst,* 304 U. S. 458, at 464 (1938). Moreover, this Court has repeatedly held that when a fundamental change of law occurs between the trial of a case and the appeal, it is the duty of the appellate court to apply the law as interpreted by the later decision, even though not raised in the lower court. See, e.g., *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch) 103 (1801); *Vanderbark* v. *Owen-Illinois Glass Co.,* 311 U. S. 538 (1941); *Hormel* v. *Helvering,* 312 U. S. 552 (1941); *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U. S. 205, 212-13 (1952); cf. *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964); *Linkletter* v. *Walker,* —— U. S. ——, 14 L. ed. 2d 601 (1965); *contra, Curtis Publishing Co.* v. *Butts,* —— F. 2d —— (5th Cir., decided July 16, 1965) holding the constitutional principles of the *Times* case to have been waived by the failure to raise them at the trial.

the *New York Times* test. In *Garrison,* the principles of the *New York Times* case were held to require a reversal of a criminal libel conviction based upon findings, which were virtually identical to the instructions in the present case, that Garrison's charges were published with "hatred, ill will or enmity or a wanton desire to injure", and alternatively, that the charges were "not made in a reasonable belief of their truth." As this Court noted, "[t]he reasonable-belief standard is not the same as the reckless disregard of truth standard." 379 U. S. 79. See also *Henry* v. *Pearson,* 380 U. S. 356 (1965).

Unless the respondent, at the time of his employment by the Belknap County Commissioners, was not a "public official" within the meaning of *New York Times Co.* v. *Sullivan* and *Garrison* v. *Louisiana,* it is clear that a reversal of the judgment below is required.

II.

The constitutional principles of *New York Times Co.* v. *Sullivan* are applicable to charges of mismanagement against the supervisor of a publicly-owned recreation area.

Although in *New York Times,* this Court made no attempt to determine "how far down into the lower ranks of government employees the public official designation would extend for purposes of this rule",[2] it is clear that the respondent, as supervisor of the publicly-owned Belknap Recreation Area, was a "public official" whose activities

[2] 376 U. S. at 283, footnote 23.

while in office were subject to constitutionally protected scrutiny and criticism under the *Times* case.

For almost ten years prior to the publication, respondent Baer had been employed by Belknap County under the direction of the three county commissioners to supervise and operate the large Belknap Mountain Recreation Area outside Gilford, New Hampshire. As supervisor of the area, Baer was paid an annual salary of $8,000 from public funds.

In this capacity, Baer was charged with the overall management and supervision of the extensive recreation facilities, the employment of all personnel and the approval of all purchases and expenditures for the area. Nor were the financial operations of the area of minor importance. During the four winter months beginning December, 1958, when the area was still under respondent's supervision, the area had gross receipts of more than $125,000.

For more than a year prior to publication of the allegedly defamatory column, the question of the proper management and development of the Belknap Recreation Area had been the subject of an extended and sometimes heated public controversy in Gilford and Belknap County. In June of 1959 this controversy resulted in the enactment of legislation which removed the Recreation Area from the control of the three-man county commission and placed it under the supervision of a newly-created five-man commission. N. H. Laws 1959, ch. 399, approved June 15, 1959. The services of the respondent were terminated and the commission employed a new supervisor to replace him.

It was in this context that the petitioner wrote the column in which he attempted to inform the people of

Gilford and Belknap County concerning the operations of the publicly-owned Belknap Recreation Area. The operation of the Belknap Recreation Area was public business and involved large expenditures of public funds. The public had every right to be fully informed concerning every aspect of these operations, both past and present.[3]

The "public official" rule of the *New York Times* case is not a rigid abstraction which is to be applied without regard to the great purposes of free speech in a free society which are secured by the First Amendment. These purposes recognize, as did the framers, that public discussion of the affairs of government is both a political right and duty, which must be preserved inviolate to the end that government will be responsive to the will of the peo-

[3] This Court has held the constitutional principles of the *New York Times* case to be applicable in libel cases brought by officials whose positions and responsibilities were of no greater public importance than those of respondent. Thus, in *Henry* v. *Pearson*, 380 U.S. 356 (1965), these principles were held to require the reversal of a libel suit brought against Aaron Henry by a lawyer whose only public employment was as a part-time county attorney of Coahoma County, Mississippi, based on Henry's charges that his arrest for disturbing the peace was part of a "diabolical plot". In the companion case, *Henry* v. *Collins*, 380 U. S. 356 (1965), a suit brought by the Chief of Police of Clarksdale, Mississippi, was also reversed. Similarly, the principles of the *Times* case were held to require reversal of a criminal libel conviction based on a publication which had charged the district attorney of Iberia Parish, Louisiana, with having knowingly used perjured testimony to obtain a conviction. *Moity* v. *Louisiana*, 379 U. S. 201 (1964). And see the dissenting opinion of Judge Richard Rives in *Curtis Publishing Co.* v. *Butts*, —— F. 2d —— (5th Cir., decided July 16, 1965), finding the principles of the *New York Times* case to be applicable to a libel suit brought by the athletic director of a state university who was alleged to have fixed a college football game; and *Schneph* v. *New York Times Co.*, 252 N. Y. S. 2d 934 (1964), in which a libel suit brought by the "principal attorney and chief of the Penalties Division of the Office of Corporation Counsel of the City of New York", was dismissed under the principles of the *Times* case.

ple. *Whitney* v. *California,* 275 U. S. 357, 275-76 (1927) (concurring opinion of Mr. Justice Brandeis); *Stromberg* v. *California,* 283 U. S. 359 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937). Thus, as Mr. Justice Brennan emphasized in the *Garrison* case:

> "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation . . ." 379 U. S. 77.

This paramount public interest in a free flow of information extends to comment on all levels of governmental operations, and includes the right to discuss freely and to criticise the activities of all employees of government and persons in public service, whether such persons happen to be elected or appointed.[4] Mr. Justice Black has concisely summarized the meaning of the constitutional privilege:

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[4] Even prior to the First Amendment, the rights of freedom of speech and of the press were understood as encompassing the right to criticize men at all levels of government service. As Junius emphasized in his famous *Letters* "With regard to strictures upon the character of men in office, [and] the measures of government . . . a considerable latitude must be allowed in discussion of public affairs, or the liberty of the press will be of no benefit to society." *Letters of Junius,* quoted in Storey, *Commentaries on The Constitution* 1884, footnote 3 (2d ed. 1851). "The First Amendment was written by men to whom Wilkes and Junius were household words." Chafee, *Free Speech in The United States* 21 (1941). The broad scope of the rights of freedom of speech and of the press was also emphasized by the Continental Congress in its letter to the inhabitants of Quebec (October 26, 1774) discussing the "five great rights": "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elected or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaude or to criticize the way public employees do their jobs, from the least to the most important." *Barr* v. *Matteo,* 360 U. S. 564, 577 (1959) (concurring opinion).

Thus, the First Amendment protects the right of the public to a free flow of information concerning charges of incompetence, misappropriation of public funds or betrayal of public trust by all public employees, from the highest to the lowest, equally with the more sensational charges of graft or corruption against prominent officials in the higher echelons of government.[5] In the language of

---

of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." I *Journal of the Continental Congress,* 104, 108 (1904).

[5] While the constitutional principles of the *New York Times* case extend to all employees of government at all levels of public service, the importance and duties of a particular office remain an important consideration in determining whether a particular matter is germane to an employee's fitness for office or constitutes a purely private libel "totally unrelated to public affairs." As this Court said in *Barr* v. *Matteo,* 360 U. S. 564, 573-74 (1959), "It is not the title of his office, but the duties with which the particular officer . . . is entrusted . . . which must provide the guide . . . " Thus, charges which may be entirely irrelevant as applied to lesser public employees may become relevant as they relate to persons higher up in government, or more sensitively placed.

Thomas Jefferson, only in this manner can the press fulfill its constitutionally assigned function as "the formidable censor of the public functionaries by arraigning them to the tribunal of public opinion." XV Bergh, *The Writings of Thomas Jefferson*, 480, 489 (1907). "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936).

No meaningful distinction can be made between the right of the public to be informed concerning the activities of elected officials and the activities conducted by those in government service whom they employ. Few government programs are administered exclusively by higher officials. Virtually all governmental activities are administered through tiers of public employees to whom duties are delegated and subdelegated. No criticism of such programs can avoid reflection on the lesser officials as well as those at the top. Yet the free flow of information will be restrained and public debate on these issues inhibited if lesser employees and officials can bring libel suits based on such criticisms, even though their superiors may not. The privilege of criticising the principal will be of little benefit if his agents can nevertheless sue for libel.

The deficiencies of such a rule are illustrated in the present case in which the allegedly defamatory column constituted of no more than a critical comparison of the operations of the Belknap Recreation Area under its new management with those in prior years when the Area was controlled by the three-man County Commission. The article reflected upon respondent's reputation only because

it questioned the manner in which the Area was operated during the period in which he was employed by the County as its supervisor and was responsible for its management. Its inevitable effect was also to cast an equal reflection upon the reputations of respondent's superiors, the three County Commissioners. It would be paradoxical indeed to hold the public interest to require the application of the First Amendment principles of the *Times* case in suits brought by the Commissioners, but to withhold constitutional protection for the same statements in a suit brought by respondent arising out of the same publication.

This case likewise demonstrates the impracticability of attempting to distinguish between the right of the press to criticise former officials and the right to criticise those currently in office. Many of the most notorious government scandals have been uncovered only after those responsible were no longer in office. Certainly a public official, by leaving office, does not thereby clothe his conduct while in office with immunity from public scrutiny nor deprive the press of the right to comment thereon. And since government is never static, any meaningful comparison of government operations, such as that attempted by petitioner here, necessarily reflects either on the performance of past or present office holders. Through such comparative appraisals of government operations, the press makes a genuine contribution to public information concerning government affairs and is entitled to constitutional protection under the *Times* case.[6]

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[6] Even a standard encompassing the right of the press to comment without malice only upon the official conduct of persons in government service would leave unprotected many areas of vital public interest. Such a test, rigidly applied, would exclude comments upon candidates for public office, but as this Court rightly noted in

The First Amendment is "much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. . . . It is a declaration of national policy in favor of public discussion of all public questions." Chafee, *Free Speech in the United States* 6 (1941).[7] It has long been recognized that, in interpreting the First Amendment, "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

Garrison, quoting the Supreme Court of Kansas in *Coleman* v. *McLennan*:

> " 'Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office . . . ' " 379 U. S. at 77.

And see *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964), cert. den. 379 U. S. 968 (1965). Similar protection might also be extended to discussion of the activities of persons who seek to influence public opinion by putting themselves forward as participants in public debates and as spokesmen on controversial issues of grave public concern. (See *Associated Press* v. *Walker*, in which the trial court, while recognizing that "the evidence is undisputed that General Walker was a public figure at the time of the riot on the Ole Miss campus," refused to apply the principles of the *New York Times* case and upheld a verdict of $500,000 general damages. This decision was affirmed by the Texas Court of Civil Appeals, 2nd Dist., No. 16624, July 30, 1965.)

[7] Its purpose is to protect "the free publication of matters of public concern, [and] to secure [the] right to a free discussion of public events and public measures. . . . The evils to be prevented were not the censorship of the press merely but any action by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Cooley, *Constitutional Limitations*, 603-604. And see Meiklejohn, *Free Speech and Its Relationship to Self-Government*, 37-39, 88-89, 94 (1948).

Throughout its decisions, this Court has repeatedly emphasized that "Great secular causes with small ones are guarded by [the First Amendment] . . . and the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins,* 323 U. S. 516, 530-31 (1945). See e.g. *United States* v. *Cruikshank,* 92 U. S. (2 Otto) 542 (1876). "The very idea of a government, republican in form, implies the right . . . to meet peaceably for consultation in respect to public affairs . . . ;" *Whitney* v. *California,* 274 U. S. 357, 375-76 (1927) "public discussion is a political duty;" *Stromberg* v. *California,* 283 U. S. 359, 369 (1931) "full political discussion;" *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 250 (1936) "an untrammeled press . . . a vital source of public information;" *DeJong* v. *Oregon,* 299 U. S. 353, 366 (1937) "public issues of the day;" *Thornhill* v. *Alabama,* 310 U. S. 88, 101-102 (1940) "all matters of 'public concern' ", "significant issues of the times;" *Bridges* v. *California,* 314 U. S. 252, 268-70 (1941) "arena of public discussion," "public expression [on a] problem of public interest;" *Pennekamp* v. *Florida,* 328 U. S. 331, 346 (1946) "Free discussion of the problems of society is a cardinal principle of Americanism;" "the whole gamut of public affairs is the domain for fearless and critical comment" (concurring opinion of Mr. Justice Frankfurter); *Craig* v. *Harney,* 331 U. S. 367, 375 (1947) "Community events of legitimate interest . . . conduct in the public eye." [8]

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[8] Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875, 877 (1949); Berney, *Libel and the First Amendment—A New Constitutional Privilege,* 51 Va. L. Rev. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* The Supreme Court Review 1964, 191 (1964); Note, *Constitutional Law—Freedom of the Press—Libel—State Law Allowing Libel by Public Official Without Proof of Malice Held Unconstitutional,* 42 Tex. L. Rev. 1080 (1964); Note, *Constitutional Law—First Amendment Requires Qualified Priv-*

As this Court said in *Thornhill* v. *Alabama*:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subse-

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ilege to Punish Defamatory Misstatements About Public Officials, 113 Pa. L. Rev. 284, 285-86 (1964); *The Supreme Court*, 1963 Term, 78 Harv. L. Rev. 201, 203 (1964). The States, in defining the scope of their fair comment rules, have not limited this protection to criticisms of public employees, but have extended the privilege to all matters of public concern and interest. As the Supreme Court of Kansas emphasized in *Coleman* v. *McLennan*, 78 Kan. 711, 98 Pac. 281 (1908), a case on which this Court relied in formulating the constitutional principles of the *Times* case, "This privilege extends to a great variety of subjects, and includes matters of public concern, public men and candidates for office." And see e.g. *Hoeppner* v. *Dunkirk Printing Company*, 254 N. Y. 95, 172 N. E. 139 (1930), criticism of ability of high school football coach; *Clark* v. *McBaine*, 299 Mo. 77, 252 S. W. 428 (1923), statement of reasons for discharge of a law school professor; *Blanchard* v. *Claremont Eagle, Inc.*, 95 N. H. 375, 63 A. 2d 791 (1949), criticism of doctor's refusal to give emergency aid to child; *Krebiozen Research Foundation* v. *Beacon Press*, 334 Mass. 86, 134 N. E. 2d 1, 6 (1956), article attacking effectiveness of Krebiozen as a cure for cancer; *Bearch* v. *Bass*, 88 Me. 521, 34 Atl. 411 (1896), criticism of a public building and its builder; *Griffin* v. *Opinion Publishing Company*, 114 Mont. 502, 138 P. 2d 580 (1943), criticism of proposed settlement of litigant's claim against municipality; *Cohen* v. *Cowles Publishing Company*, 45 Wash. 2d 262, 273 P. 2d 893 (1954), criticism of poor race by a jockey; *Klos* v. *Zahorik*, 113 Iowa 161, 84 N. W. 1046 (1901), condemning solicitation by a Catholic priest of funds to assist Spaniards; *Siemiankowski* v. *Pankiewicz*, 98 N. Y. S. 2d 277 (1950), criticizing methods of a school teacher; *Gattis* v. *Kilgo*, 128 N. C. 402, 38 S. E. 931 (1901), charges of incompetency against the president of a private college; *Flanagan* v. *Nicholson Publishing Company*, 137 La. 588, 68 So. 964 (1915), criticism of local labor leader's support of application of rival city for an exposition; *Cabrey* v. *Cameron*, 55 D. & C. 127 (Pa., 1945), derogatory comments about the friend of a candidate for public office; and *Kennedy* v. *Item Company*, 197 La. 1050, 3 So. 2d 175 (1941), criticism of candidate for admission to bar because of link with allegedly corrupt state government. The Restatement has similarly defined the right of fair comment as extending *to all* "criticism of so much of another's activities which are mat-

> quent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (310 U. S. 88, 101-102).

This clearly was Madison's understanding of the scope of the protection of the First Amendment. In the famous Virginia Resolutions of 1798, protesting the Alien and Sedition Acts, Madison said that the First Amendment guarantees "the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." IV *Elliot's Debates on the Federal Constitution,* p. 554 (1876). "In every state," Madison argued, " . . . the press has exerted a *freedom of canvassing the merits and measures of public men of every description* . . . On this footing the freedom of the press has stood; on this foundation it yet stands . . . " IV *Elliot's Debates, supra* at 570 (emphasis supplied). Madison vigorously opposed the Sedition Act because "it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, *without*

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ters of *public concern*" including "the private conduct or character of another who is engaged in activities of public concern, insofar as his private conduct or character affects his public conduct." Restatement *Torts* §606. And Odgers, *Libel and Slander* 158 (6th ed. 1929), "matters of public interest and general concern"; Newell, *Slander and Libel* §477 (4th ed. 1924), "matters of public interest and general concern."

striking at the right of freely discussing public characters and measures . . . " IV *Elliot's Debates, supra* at 575 (emphasis supplied).

When the First Amendment is read in its historical context and against "the background of profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open . . . ", it is apparent that the great constitutional principles of the *New York Times* case require at the very least the protection of the right of the press to comment freely and without malice on the official conduct of all public officers high or low. Only in this manner can the fundamental freedoms of speech and press be assured the "breathing space" which they need to survive.

CONCLUSION

The judgment of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y.

EDWARD J. ENNIS
165 Broadway
New York, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for the American Civil Liberties Union, Amicus Curiae

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